United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7127

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JACKSON O. KING,

Plaintiff-Appellee,

-against-

DEUTSCHE DAMPS-GES,

Defendant and Third Party Plaintiff
Appellee-Appellant,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.
and COURT CARPENTRY & MARINE CONTRACTING
COMPANY,

Third Party Defendants-Appellants.

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P/S

ANSWER OF THIRD PARTY DEFENDANT-APPELLANT
INTERNATIONAL TERMINAL OPERATING CO. INC.
TO PETITION FOR REHEARING

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PRELIMINARY STATEMENT

On or about August 18, 1975, third party defendant-appellant, Court Carpentry & Marine Contracting Co , hereinafter referred to as Court, filed a petition for rehearing from the affirmance on August 8, 1975 of the judgment for plaintiff. By order of this Court, dated the 5th day of September, 1975, the other parties except for the plaintiff-appellee were directed to respond to the petition. The following is the answer of third party defendant International Terminal Operating Co. Inc., hereinafter referred to as ITO.

ISSUE PRESENTED

Should the judgment in favor of plaintiff against defendant and the judgment in favor of the defendant against

third party defendants finding them joint and severally liable for the amount awarded to plaintiff be amended to alter the share of Court to 25 per cent or, in the alternative, should the case be remanded for findings on Court's claim for contribution against ITO?

ARGUMENT

THE PETITION FOR REHEARING SHOULD BE DENIED. THE RELIEF SOUGHT IS REQUESTED FOR THE FIRST TIME ON THIS PETITION AND COMES TOO LATE. IT SHOULD ALSO BE DENIED ON ITS MERITS.

Court's petition for rehearing asks for an alteration of the judgment or a remand to the district court for the purpose of reducing its proportionate share from one half to the amount found by the jury as plaintiff's contributory negligence, namely one quarter. Court claims that this relief should be awarded to it because of the recent changes in maritime law that allow contribution between joint tort feasors both in personal injury cases and in collision cases. Court argues that the recent case of U.S. v. Reliable Transfer Co. Inc., 95 S. Ct. 1708 indicates that the rule of proportionate contribution between joint tort feasors has been established. It is true that the case overthrew the long established admiralty rule of equal division of the damages where both parties were at fault and adopted instead the more generally followed rule

of comparative fault. However, that holding was strictly limited to collision and stranding cases and is not authority for the principle of proportional contribution of joint tort feasors in a maritime personal injury case. Moreover, the relief asked by Court was not advanced either before the District Court or upon the appeal to this Court. It is relief requested for the first time in this petition and should be denied.

Rule 40 FRAP provides that a petition for rehearing is for the purpose of arguing points of law or fact which the court has overlooked or misapprehended. Court essentially made two arguments on its appeal, namely, that plaintiff's judgment should not stand because he had not established his case for lack of sufficient evidence on the issue of unseaworthiness and, that the District Court was in error in directing indemnity in favor of the ship owner against Court on the basis of the contributory negligence of the plaintiff (Court's employee). This Court squarely met both arguments and neither overlooked nor misapprehended any point of law or fact. Court does not argue in this petition that the Court did so but, instead takes an entirely new tack contending that it is entitled to have the judgment altered in its favor or an additional hearing on its claim for proportionate contribution from ITO.

Rule 59(e) of the FRCP provides for a motion to amend the judgment to be served not later than ten days after the entry of judgment. Such an application on this petition for rehearing clearly comes too late and should be denied on that ground alone.

Rule 59(b) provides for a new trial on all or part of the issues to be requested by motion not later than ten days after the entry of judgment. Again, to the extent that the petition requests a new trial or hearing on Court's claim for contribution, it comes too late and should be denied.

The petition should also be denied on its merits. This Court in Hurdich v. East Mount Shipping Corp., 503 F. 2d 397 in deciding that contribution between joint tort feasors was permissible under maritime law in a non-collision case at the same time adopted the District Court's finding that damages between the joint tort feasors should be divided equally.

The same approach was used by this Court in the case of In Re Seaboard Shipping Corporation, 449 F. 2d 132. There the owner of a tug and the owner of a barge were both found negligent in the deaths of two bargemen and the damages were divided equally.

Both cases were followed by Western Tankers Corporation v. United States, 387 F. Supp. 487 (U.S.D.C., S.D.N.Y. January 22, 1975). There the District Court held that the injury

was caused both by the negligence of the vessel and the United States. It said at page 491-92: "When contribution is found to be appropriate in maritime personal injury cases, damages are awarded equally between the parties, regardless of the relative degree of fault."

Therefore there is authority in this Circuit for the equal division of damages where joint tort feasors are involved. Moreover, after two trials and an appeal in this case, there is no need to return this case for further findings as to the proportion of fault as between Court and ITO. The District Court found that the third party defendants were jointly and severally liable to the vessel owner and that finding was unchallenged until this petition was filed. There is no reason to believe that a different proportion would result from new findings.

CONCLUSION

The petition for rehearing by Court should be denied both because it is untimely and because it fails on the merits.

FOGARTY, McLAUGHLIN & SEMEL
Attorneys for Third Party
Defendant-Appellant
INTERNATIONAL TERMINAL OPERATING CO. INC.

DOUGLAS A. BOECKMANN
Of Counsel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Marion Boffa, being duly sworn, deposes and says that she is over the age of 18 years and a clerk in the office of DOUGLAS A. BOECKMANN, Of Counsel to Fogarty, McLaughlin and Semel the attorneys for third party defendant-appellant International Terminal Operating Company, Inc. that on the 23 day of September, 1975 she served two copies of the annexed Answer to Petitition for Rehearing upon Alexander, Ash, Schwartz & Cohen, attorneys for Court Carpentry & Marine Contracting Company
Haight, Gardner, Poor & Havens, attorneys for Deutsche Damps-Ges
Sergi & Fetell, attorneys for plaintiff
in a post office box regularly maintained by the Government of the United States at 10 Rockefeller Plaza, New York. N.Y., 10020, directed to said attorneys at: 801 Second Ave. New York, N.Y. 10017,
One State Street Plaza New York, N.Y. 10004,
and 44 Court Street Brooklyn, N.Y. 11201, respectively,
heretofore designated by them for that purpose.

Marion Boffa

Sworn to before me this
23 day of September, 1975

Helen Johnides

HELEN JOHNIDES
NOTARY PUBLIC, State of New York
No. 31-7090350
Qualified in New York County
Commission Expires March 30, 1976